

PROBATE AND ESTATE PLANNING SECTION OF THE STATE BAR OF MICHIGAN

Position Statement Regarding HB 4410

Testimony provided by: Katie Lynwood, Vice-Chair, Legislative Development and Drafting Committee of the Probate and Estate Planning Section of the State Bar of Michigan

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1. Introduction

Good afternoon. My name is Katie Lynwood. I am a member of the council of the Probate and Estate Planning Section of the State Bar of Michigan, and the vice-chair of the Section's Legislative Development and Drafting Committee. I am here today to share my Section of the State Bar's position on HB 4410.

The Probate and Estate Planning Section is not the State Bar of Michigan itself, but rather a Section whose members choose voluntarily to join, based on common professional interest. The Section's formal position statement accompanies the written testimony that I have filed with your committee.

2. Public Policy Position

Our Section and Committee have closely studied the Court of Appeals' 2015 decision in *In re Estate of Shelby Jean Jajuga*. In that case, the Court of Appeals applied the "exempt property allowance" provision.

Michigan's Estate and Protected Individuals Code—often called "EPIC"—governs wills and estates. In most ways, EPIC respects individuals' freedom to pass their property according to their last will. In some limited cases, however, EPIC overrides the freedom to will one's property.

The *Jajuga* case involved one of these types of overrides—the exempt property allowance, which is created by MCL 700.2404. There are two public policies behind the exempt property allowance.

- The first policy is that, even if an estate is insolvent, the deceased person's spouse or children should not lose the modest property in their home to the deceased person's creditors. To further this policy, MCL 700.2404 sets aside up to \$15,000 (in today's inflation-adjusted numbers) in property for the surviving spouse or children. This allowance is paid even if the estate has significant unsecured debts.
- The second policy is that, even if the deceased person disinherits their spouse or children,

they would at least receive some modest property to support them. To further this second policy, the \$15,000 is payable to the surviving spouse, even if she or he is disinherited. If there is no surviving spouse, this allowance is payable to the surviving children.

It is this second policy that can cause mischief. Sometimes there are good reasons to completely disinherit a person:

- The person may have severe creditor problems, meaning that any gift will be immediately lost to creditors.
- The person may have a serious substance abuse problem. In this situation, the payment of a \$15,000 exempt property allowance would feed a deadly habit.
- Sometimes, the deceased person has provided for the person outside of their probate estate. This could be through beneficiary designations, trusts, or lifetime gifts. In this situation, the extra exempt property allowance gives them an unfair windfall and unexpectedly reduces gifts to others.
- Some beneficiaries have special needs or severe disabilities. If they receive this allowance, it might eliminate their access to vitally-important Supplemental Security Income, Medicaid, and mental health services.

For these reasons, my Section of the State Bar supports changing MCL 700.2404 to enable one's ability to reduce or eliminate a family member's entitlement to the exempt property allowance.

Over the last two years, my committee has prepared multiple drafts of legislation to improve MCL 700.2404. The drafts have attempted to honor a person's intent for their estate while keeping the spirit of the public policy for the allowance. There is little controversy concerning the exclusion of one's adult children from receiving this allowance.

Some may feel differently about the exclusion of one's minor children from the allowance. After two years of close consideration of the issue, however, we have concluded that more good than harm will be accomplished by allowing the exclusion of minor children. As part of our own deliberations, we did consider adding "safe harbor" provisions that would allow a person to exclude a minor child in only certain narrow circumstances, such as where the child needs to qualify for means-tested public benefits. But ultimately, we have reached the conclusion that there is no workable way to create such a "safe harbor."

Therefore, on behalf of the Probate and Estate Planning Council of the State Bar of Michigan, we support the redlined version of House Bill 5638, which is attached to the written testimony that I have filed with the Committee.

Thank you for your consideration.



PROBATE & ESTATE PLANNING SECTION

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Public Policy Position

HB 4410

The Probate & Estate Planning Section is a voluntary membership section of the State Bar of Michigan, comprised of 3,336 members. The Probate & Estate Planning Section is not the State Bar of Michigan and the position expressed herein is that of the Probate & Estate Planning Section only and not the State Bar of Michigan. To date, the State Bar does not have a position on this item.

The Probate & Estate Planning Section has a public policy decision-making body with 22 members. On September 9, 2017, the Section adopted its position after discussion and vote at a scheduled meeting. 16 members voted in favor of the Section's position on HB 4410, 0 members voted against this position, 0 members abstained, 6 members did not vote.

The Probate & Estate Planning Section Supports the Public Policy Position Adopted by the Council on September 10, 2016 related to HB 5638

The Probate & Estate Planning Section support the public policy position adopted by the Council on September 10, 2016 related to HB 5638.

Explanation:

This legislation clarifies the language of MCL 700.2404 following the ruling of the Michigan Court of Appeals in the 2015 case *In re Estate of Jajuga*. The Court effectively ruled that parents cannot disinherit their children by will. The Council previously supported proposed substitute H-3, adopted by the House Judiciary Committee, to 2016 HB 5638. The Council recommends returning to this previous version of the legislation.

Contact Person: Christopher Ballard

Phone: 734-372-2912



PROBATE & ESTATE PLANNING SECTION

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Respectfully submits the following position on:

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HB 5638

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The Probate & Estate Planning Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interest.

The position expressed is that of the Probate & Estate Planning Section only and is not the position of the State Bar of Michigan.

The State Bar does not have a position in this matter.

The total membership of the Probate & Estate Planning Section is 3,769.

The position was adopted after discussion and vote at a scheduled meeting. The number of members in the decision-making body is 22. The number who voted in favor to this position was 15. The number who voted opposed to this position was 0.

Report on Public Policy Position

Name of section:

Probate & Estate Planning Section

Contact person:

Marguerite Munson Lentz

E-Mail:

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Bill Number:

HB 5638 (Lucido) Probate; wills and estates; exempt property; allow decedent to exclude adult child by written instrument. Amends sec. 2404 of 1998 PA 386 (MCL 700.2404).

Date position was adopted:

September 10, 2016

Process used to take the ideological position:

Position adopted after discussion and vote at a scheduled meeting.

Number of members in the decision-making body:

22

Number who voted in favor and opposed to the position:

15 Voted for position

0 Voted against position

0 Abstained from vote

7 Did not vote (absent)

Position:

Support with Recommended Amendments

Explanation of the position, including any recommended amendments:

The Section supports HB 5638 with the proposed changes in the attachment.

The text of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report.

<http://legislature.mi.gov/doc.aspx?2016-HB-5638>

[Recommended changes to HB 5638; Draft 2.]

A bill to amend 1998 PA 386, entitled
"Estates and protected individuals code,"
by amending section 2404 (MCL 700.2404), as amended by 2000 PA 177.
THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 2404. (1) The decedent's 1 surviving spouse is also
2 entitled to household furniture, automobiles, furnishings,
3 appliances, and personal effects from the estate up to a value not
4 to exceed \$10,000.00 more than the amount of any security interests
5 to which the property is subject. If ~~EXCEPT AS OTHERWISE PROVIDED~~
6 ~~IN SUBSECTION (4)~~, IF there is no surviving spouse, the decedent's
7 children WHO ARE NOT EXCLUDED UNDER SUBSECTION 4 are entitled jointly to the same
value.
8 (2) If ~~EXCEPT AS OTHERWISE PROVIDED IN SUBSECTION (4)~~, IF

9 encumbered assets are selected and the value in excess of security interests, plus that of 1 other exempt
property, is less than

2 \$10,000.00, or if there is not \$10,000.00 worth of exempt property

3 in the estate, the spouse or children WHO ARE NOT EXCLUDED UNDER SUBSECTION 4 are
entitled to other assets

4 of the estate, if any, to the extent necessary to make up the

5 \$10,000.00 value. Rights to exempt property and assets needed to

6 make up a deficiency of exempt property have priority over all

7 claims against the estate, except that the right to assets to make

8 up a deficiency of exempt property abates as necessary to permit

9 payment of all of the following in the following order:

10 (a) Administration costs and expenses.

11 (b) Reasonable funeral and burial expenses.

12 (c) Homestead allowance.

13 (d) Family allowance.

14 (3) The rights under this section are in addition to a benefit

15 or share passing to the surviving spouse or children by the

16 decedent's will, unless otherwise provided, by intestate

17 succession, or by elective share. The \$10,000.00 amount expressed

18 DESCRIBED in this section shall MUST be adjusted as provided in

19 section 1210.

20 ~~(4) A DECEDENT BY WILL OR OTHER SIGNED WRITING MAY EXPRESSLY~~

21 ~~EXCLUDE OR LIMIT THE RIGHT OF A CHILD WHO IS NOT A MINOR OR~~

22 ~~DEPENDENT CHILD TO MAKE A CLAIM THAT THE CHILD IS OTHERWISE~~

23 ~~ENTITLED TO UNDER THIS SECTION. THE EXCLUSION OR LIMITATION~~

24 ~~DESCRIBED IN THIS SUBSECTION MUST BE EXPRESSLY STATED BY THE~~

25 ~~DECEDENT, AND MUST SPECIFICALLY REFERENCE THE ALLOWANCE DESCRIBED~~

26 ~~IN THIS SECTION IN A MANNER SUFFICIENT TO EXPRESS THE DECEDENT'S~~

27 ~~INTENT. AN EXCLUSION OR LIMITATION STATED BY A DECEDENT BY WILL UNDER SECTION~~

~~2101, WITHOUT 1 ADDITIONAL LANGUAGE SPECIFICALLY~~

~~2~~ STATING AN INTENT TO EXCLUDE OR LIMIT A RIGHT PROVIDED UNDER THIS
~~3~~ SECTION, IS NOT CONSIDERED SUFFICIENT LANGUAGE TO EXCLUDE OR LIMIT
~~4~~ A RIGHT PROVIDED IN THIS SECTION.

22 **(4) THE DECEDENT MAY EXCLUDE 1 OR MORE CHILDREN FROM**

23 **RECEIVING THIS ALLOWANCE BY EITHER OF THE FOLLOWING MEANS:**

26 **(a) DECEDENT BY WILL EXPRESSLY STATES THAT THE CHILD TAKES NOTHING OR AN**
27 **AMOUNT OF \$10.00 OR LESS FROM THE ESTATE.**

28 **(b) DECEDENT BY WILL EXPRESSLY STATES THAT THE CHILD IS NOT TO RECEIVE AN**
29 **ALLOWANCE UNDER THIS SECTION.**

30 Enacting section 1. This amendatory act takes effect 90 days

31 after the date it is enacted into law.